

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

(Appellate Side)

Present: THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

W.P.A 3600 of 2019

Reserved on : 09.08.2023

Pronounced on: 19.10.2023

Utpal Roy

...Petitioner

-Vs-

The State of West Bengal & Ors.

...Respondents

Present:-

Mr. Rabilal Maitra

Mr. Rajit Lal Maitra

... for the Petitioner

Mr. Ratul Biswas

Mr. Kaushik Chowdhury

...for the WBBPE

Rajarshi Bharadwaj, J:

1. The instantaneous writ petition has been preferred challenging an order under Memo No. 492/1(3)2P dated 05.12.2018 wherein one Utpal Roy herein the writ petitioner was denied appointment to the post of primary school teacher under Schedule Caste Exempted category in connection with the Recruitment Process of primary school teachers, 2006 by Commissioner of School Education herein respondent No. 2 and lack of action on the part of the District Primary School Council, Jalpaiguri herein respondent No.3 for not taking any steps in respect of issuing appointment letter to the petitioner.

2. The facts of the case in a nutshell are that the petitioner belongs to 'Rajbanshi' community, recognised as Schedule Caste under the Constitution

Schedule Case/Tribe Modification Order 1956 and holds a schedule caste certificate bearing No.18546/SC dated 16.08.1996.

3. The District Magistrate, Jalpaiguri vide Memos dated 02.02.2006 and 17.02.2006 forwarded the name of 126 candidates including the petitioner before the Director of Employment Exchange. The name of the petitioner appeared as serial no. 95 under the Exempted Category Cell as Schedule Caste Exempted Category candidate and was issued an identity card on 24.02.2006.

4. The petitioner was informed by memo dated 25.08.2006 to appear personally before respondent No. 3 on 20.10.2006 for verification of certificates and computation of marks in connection with the appointment of primary teacher as per Recruitment Rules. He appeared on the said date along with documents sought for by respondent No.3. Thereafter, a call letter for written test examination to prepare the panel for recruitment of primary teacher was issued in favour of the petitioner by respondent No.3. The petitioner appeared for the examination on 29.11.2009 at Deshbandhu Nagar High School, Jalpaiguri and obtained 36.78 marks.

5. During the pendency of the selection process, a proceeding for cancellation of land looser certificate was instituted against the petitioner along with others. A list for recruitment of primary teacher comprising the names of only 32 candidates was prepared excluding the names of several candidates including the petitioner by memo no. 700/LA dated 13.08.2007. Challenging the list, a writ petition being W.P No.22545 (W) of 2007 was moved wherein the Learned Single Judge was pleased to pass by order dated 30.06.2010 that-

“As an interim measure it is directed that if the petitioners’ names have been sponsored for consideration for recruitment as Primary Teachers under the exempted category, they shall be allowed to participate in the ensuing recruitment process. It is made clear that if after preparation of the panel it is found that the petitioners have secured a place which brings them within the zone of consideration for appointment, they shall not be appointed without leave being obtained from the Court. However, in the event the petitioners to seems a place within the zone of consideration for appointment, the respondents shall be at liberty to finalize the selection process as also to appoint candidates from the panel according to law.”

6. The name of the petitioner was published in the panel prepared by respondent No. 3 where he was shown as an empanelled candidate listed under serial no. 63 under Exempted Unreserved category instead of Schedule Caste Exempted category. In addition, no appointment had been given in favour of the petitioner.

7. The aforesaid list was objected to in appeal being M.A.T No. 344 of 2011 along with C.A.N 4967 of 2011 where the Learned Division Bench through order dated 01.08.2018 directed the District Magistrate *“to recast the list of the exempted category candidates in terms of the order dated 4th May, 2006 without any further delay, but positively within a period of four weeks from the date of communication of this order without deleting the name of anybody from the panel while recasting the same.”*

8. The names of 9 candidates including the petitioner were forwarded by Chairman, District Primary School Council, Jalpaiguri herein respondent No.4 to respondent No.3 as reflected in memo No. 1180 dated 15.09.2014 and vide memo dated 24.09.2014, the candidature of all the candidates were valid once again. The petitioner requested appropriate steps to be taken for according approval for giving appointment.

9. It came to the knowledge of the petitioner by memo dated 20.11.2015 that due to non-joining of candidates and dismissal from service due to fake certificates, the number of vacancies in favour of Bengali medium Exempted Unreserved Category were four, number of vacancies in favour of Bengali medium Exempted Schedule Caste Category were six and number of vacancies in favour of Bengali medium Exempted OBC were three. The petitioner submitted answer sheets and attendance sheets in the written test conducted in pursuance to memo dated 14.03.2016 issued by Chairman, District Primary School Council, Jalpaiguri herein respondent No.4 for consideration of appointment as primary school teacher.

10. The non-action on the part of respondent No.3 for not taking any steps in respect of approval of panel for the post of assistant teacher of primary school and for not issuing appointment letter in favour of the petitioner despite several representations up till 2017 warranted writ petition W.P 3151(W) of 2018 wherein the Learned Single Judge by order dated 27.06.2018 directed respondent No. 2 to *“take steps in accordance with law on the basis of the documents already forwarded by the Chairman, District Primary School Council, Jalpaiguri to the Commissioner of School Education, West Bengal on 2nd April, 2018 without any further delay but positively within a period of four*

weeks from the date of communication of this order and thereafter communicate the decision to the petitioner within one week”.

11. The petitioner’s prayer for appointment to the post of primary school teacher was rejected by respondent No.2 through memo no. 492/1(3)2P dated 05.12.2018. The relevant portion of the order reads:-

“7...After completion of the recruitment process of primary school teachers, 2006, the Council has completed three more recruitment process in the years, 2009), (2014) and 2016). So, as per provision of the said recruitment rules, no vacancy in connection with the said recruitment process of primary school teachers, 2006 can be pending still date, but the Council has wrongly submitted that 10 vacancies due to non-joining still pending and that is why he is not being abled to submit details of such non-joining candidates. Moreover, the panel in question was approved provisionally for one year vide this Dte's Memo No. 36-Sc/P dated 12.04.2010. After expiry of the validity of the said panel, the petitioner filed this writ petition in the year 2018.”

Thus, aggrieved by the order dated 05.12.2018 of respondent No. 2, the present writ application lies.

12. It has been submitted by the learned counsel for the petitioner that the petitioner’s appointment has been withheld by respondent No.2 under groundless, unsubstantiated reasons. Having obtained 36.78 marks in total, the lowest cut off marks of Bengali medium Exempted Schedule Caste Category being 34.24, he was eligible for appointment in the post of primary school teacher.

13. Though the petitioner secured 4.5 marks out of 10 marks in the written examination, he was declared to be absent as per attendance records. Had he been absent, there should not have been any marking against the name of the petitioner in the written examination dated 29.11.2009. Although the petitioner appeared with Roll No. JAL/EC/BM/SC-122, he was incorrectly considered to be Roll No. JL/ECBM/SC-132. Further, signature of another candidate was made against Roll No. JL/ECBM/122 whereas no signature was made against Roll No. JL/ECBM/132, treating the petitioner as an absentee candidate. Such candidate had been given appointment against name of the petitioner. Several communications were made to respondent No.2 to rectify the mistakes which were not ultimately taken into consideration.

14. The petitioner in the draft panel for recruitment of primary teachers was considered in 63 position as Bengali Medium Exempted Unreserved candidate. Being well within the sanctioned vacancy as well as securing higher marks than the cut-off marks for Exempted Unreserved candidate despite belonging to Exempted Schedule Caste category, the petitioner was wrongfully denied employment opportunity.

15. Before the expiry of the panel enlisting the petitioner, he along with other candidates had made representations seeking to be included in the on-going selection process. However, the appointment of the petitioner was rejected without reasonable explanation to disclose the delay whereas recruitment process continued long after termination of the said panel resulting in the appointment of one Jabbar Ali in 2012 and six other candidates in 2014.

16. The learned counsel for respondent Nos. 3 and 4 submit that the petitioner was allowed to participate in the selection process as well as written test examination in pursuance of order dated 4.01.2008. Though he appeared in the draft panel, the petitioner failed to appear in the final panel under Bengali Medium Exempted Schedule Caste category due to remark of 'A' as absentee candidate in the original attendance sheet of the written test examination held on 29.11.2009 and was thereby considered in 63(A) position in the Bengali Medium Exempted Unreserved draft panel.

17. The Exempted Category panels were carefully approved vide memo no. 36-Sc/P dated 12.04.2010 along with additional 5% panels in Exempted Schedule Caste Category as well as Exempted Unreserved Category according to West Bengal Primary School Teachers Recruitment Rules 2001. The petitioner was rightfully denied appointment because the panel in question approved provisionally for one year had expired. Under relevant Recruitment Rules 2001, vacancy created for non-joining candidates can only be utilised from the existing panel subject to validity of the panel. The number of vacant posts were uncertain as the details of non-joining candidates, such as name, category, serial number of the panel, unwillingness letters of each non-joining candidates could not be made available by respondent No. 3 in spite of best efforts and searching for those papers on priority basis.

18. Having heard the Learned Counsel for the parties and on perusal of records, this Court finds that the writ petitioner could not be deprived of appointment to the post of primary teacher under Exempted Schedule Caste

Category. The marks secured by the writ petitioner as reflected in the answer script, marks foil and tabulation sheet suggest that the attendance of the petitioner on the date of the written examination is indisputable. Indication in appropriate areas of the aforesaid documents and assessment of merit on the basis of a different roll number thereby considering the petitioner as an empanelled candidate for Bengali medium Exempted Unreserved Category reveals error apparent on part of respondent No. 2. Laches on part of respondent No.2 cannot be a ground to deny appointment to the petitioner.

19. The petitioner having secured more than the cut-off marks in the respective category cannot be deprived of appointment on the pretext of expiry of panel and filling up of post by somebody else. The Hon'ble Supreme Court in the case of **Shankarsan Dash v. Union of India** reported in **1991 3SCC 47** opined that

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

20. It is a settled principle of law that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of non-deliberate delay. The time during which a panel though prepared and approved could not be worked out has to be excluded for the purpose of computation of life of such panel. In the present case, termination of the panel of selected candidates for the recruitment process 2006 caused delay in appointment and the life of the panel ought to have been kept alive even after the expiry of the initial period so as to serve the purpose of employment of eligible candidates including the petitioner.

21. The Hon'ble Calcutta High Court in the case of **Plaban Mukherjee v The Hon'ble High Court at Calcutta** reported in **2014(1) CHN (CAL) 336** came to a finding that

“ .. 23. Mere empanelment cannot give rise to a vested legal right for a candidate to seek appointment in the post for which a merit list or select list is published. But in the event there is arbitrary or mala fide departure from a select list to deprive a candidate from being appointed, then on this limited ground in my opinion the Court can interfere and scrutinize the action of an appointing authority. For instance, if the person whose name appears on the top position in the merit list is bypassed and appointment is given to an individual appearing below him in the select list, then it is open to the Court to enquire into the reason for such departure from maintaining the serial in the select list in order of merit.”

In order to deprive a candidate of the fruits of empanelment, there has to be justification based on valid reasons recorded upon proper application of mind for such deprivation and the same ought to be acceptable to the Court. The right to be considered for appointment crystallized in favour of the petitioner on the basis of obtaining more marks than the lowest cut-off marks cannot be defeated on a purported plea that the life of the panel had expired.

22. For the reasons discussed above, the writ application is allowed. Order passed through memo no. 492/1(3)2P dated 05.12.2018 is quashed and set aside. The respondent No.2 being the competent authority is directed to revisit the recruitment process pertaining to the petitioner as per extant Recruitment Rules by hearing the matter afresh within three months from the date of order. The petitioner must be given an opportunity of hearing and to produce all relevant documents for primary teacher candidature. Respondent No.2 is thereafter directed to re-assess in light of factual considerations and if the petitioner is found to be eligible, take further steps to recommend the petitioner in any school for his appointment.

23. With the above observations and directions, the writ application is disposed of.

24. There shall, however, be no order as to costs.

25. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(RAJARSHI BHARADWAJ, J)

Kolkata

19.10.2023

PA (BS)